IN THE

Supreme Court of the United States

October Term, 1940

No. 555

THE TEXAS COMPANY, a Delaware corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CEPTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HARRY T. KLEIN
OSCAR JOHN DORWIN
JAMES H. PIPKIN
LIONEL P. MARKS
Attorneys for Petitioner
135 East 42nd Street
New York, N. Y.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Summary of Proceedings Below	2
Questions Presented	4
Statement	4
Argument	5
Alleged Interference, Restraint, and Coercion	5
Alleged Domination of The Brotherhood	7
Alleged Domination of the Plan	10
Reasons for Allowing the Writ	11
Conclusion	13
Appendix	
National Labor Relations Act, Sections 7, 8(1) and (2), and 10(e)	14

Table of Cases

	PAGE
Ballston-Stillwater Knitting Co. Inc. v. National Labor Relations Board (2nd Circuit), 98 F. 2d 758, 761-2	8, 12
Consolidated Edison Company v. National Labor Relations Board, 305 U. S. 197, 229, 59 Sup. Ct. 206, 217	8
Cupples Co. Manufacturers v. National Labor Relations Board (8th Circuit), 106 F. 2d 100, 114-116	9, 12
L. Greif & Bro., Inc. v. National Labor Relations Board (4th Circuit), 108 F. 2d 551, 557-558	9, 13
Jefferson Electric Company v. National Labor Relations Board (7th Circuit), 102 F. 2d 949,956	6, 12
Midland Steel Products Co. v. National Labor Relations Board (7th Circuit), 102 F. 2d 800, 804	6, 12
National Labor Relations Board v. Asheville Hosiery Co. (4th Circuit), 108 F. 2d 288	6, 12
National Labor Relations Board v. Columbian Co., 306 U. S. 292, 299-300, 59 Sup. Ct. 501, 505	8
National Labor Relations Board v. Ford Motor Company (6th Circuit), decided Oct. 8, 1940; 7 L. R. R. 163,167-8 (Not yet officially reported)	6, 12
National Labor Relations Board v. Mathieson Alkali Works (4th Circuit), decided October 7, 1940; 7 L. R. R. 169, 170-2 (Not yet officially reported)	9, 13
National Labor Relations Board v. Sterling Electric Motors (9th Circuit), 109 F. 2d 194, 201-210	9, 13
National Labor Relations Board v. Swank Products, Inc. (3rd Circuit), 108 F. 2d 872, 874-5	9, 13
National Labor Relations Board v. Union Pacific Stages (9th Circuit), 99 F. 2d 153, 178	6, 12
Texas & New Orleans R. R. Co. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548, 568, 50 Sup. Ct. 427, 433	6

Statutes

National Labor Relations Act	
Section 7	14
Section 8(1) and (2)	14
Section 10(e)	14

IN THE

Supreme Court of the United States

October Term, 1940

No.

THE TEXAS COMPANY, a Delaware corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, The Texas Company, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Fifth Circuit entered in this cause on July 15, 1940, denying the petition of The Texas Company to set aside a decision and order of the National Labor Relations Board, dated November 17, 1939.

Opinions Below

The opinion of the Circuit Court of Appeals (Transcript of Record pp. 597-598) is reported in 112 F. (2nd) 744. The decision and order of the National Labor Relations Board (Transcript of Record pp. 454-486J) are reported as 17 N.L.R.B. No. 73.

Jurisdiction

The decree of the Circuit Court of Appeals (Transcript of Record pp. 600-602) was entered July 15, 1940. A petition for rehearing (Transcript of Record pp. 603-608) was denied on August 7, 1940 (Transcript of Record p. 609). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, and under Section 10(e) and (f) of the National Labor Relations Act.

Statute Involved

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C., Supp. V, Sec. 151 et seq.) are set forth in the appendix to this petition (infra p. 14).

Summary of Proceedings Below

On April 22, 1938, the Oil Workers International Union filed certain amended charges (Transcript of Record pp. 10-14) with the Board, pursuant to which the Board, on May 4, 1938, issued a complaint (Transcript of Record pp. 15-25) alleging that the petitioner had engaged in certain unfair labor practices at its refineries at Galena Park and Port Neches, Texas. Petitioner filed its answer (Transcript of Record pp. 46-147) and hearings were held. The Trial Examiner filed two Intermediate Reports (Transcript of Record pp. 160-178 and 289-309), to each of which petitioner filed exceptions (Transcript of Record pp. 191-288 and 311-380). An oral argument was had (Transcript of Record pp. 407-453), and on November 17, 1939, the Board issued its decision and order (Transcript of Record pp. 454-486J), finding that:

1. Petitioner had dominated and interfered with the formation and administration of The Employe

Representation Plan at both refineries (Transcript of Record pp. 470-1).

2. Petitioner had dominated and interfered with the formation and administration of The Employes Brotherhood at its Port Neches refinery (Transcript of Record p. 486F).

3. Petitioner had interfered with, restrained, and coerced the employes at its Port Neches refinery in the exercise of their rights guaranteed in Section 7 of the Act (Transcript of Record p. 486).

4. Petitioner had *not* dominated or interfered with the labor organization at its Galena Park refinery known as "The Houston Works Employes Federation of The Texas Company" (Transcript of Record p. 480).

The Board ordered petitioner (1) to cease and desist from dominating and interfering with the Plan at both refineries and the Brotherhood at the Port Neches refinery, (2) to cease and desist from otherwise interfering with, restraining, or coercing its employes, and (3) to disestablish the Brotherhood; but dismissed the complaint in so far as it related to the Federation at the Galena Park refinery (Transcript of Record, pp. 486 I-J).

On November 25, 1939, petitioner filed in the United States Circuit Court of Appeals for the Fifth Circuit a petition (Transcript of Record pp. 509-567) to review and set aside the said order. On June 19, 1940, the Circuit Court of Appeals handed down its opinion (Transcript of Record pp. 597-598) refusing to set aside the said order, and on July 15, 1940, issued the decree (Transcript of Record pp. 600-602) which petitioner now seeks to have reviewed. A petition for rehearing (Transcript of Record pp. 603-608) was filed by petitioner on August 3, 1940, and was denied on August 7, 1940 (Transcript of Record p. 609).

Questions Presented

1. Whether the Court's decree and the Board's order abridge freedom of speech in violation of the First Amendment to the Constitution of the United States.

2. Whether there was substantial evidence to support the Board's conclusion that petitioner interfered with, restrained, and coerced its employes at its Port Neches refinery.

3. Whether there was substantial evidence to support the Board's conclusion that petitioner dominated or contributed support to The Employes Brotherhood at petitioner's Port Neches refinery.

4. Whether the Board properly ordered petititioner to cease and desist from dominating the Employe Representation Plan.

Statement

Petitioner is engaged in the oil business and operates a number of refineries, among which are its refineries at Port Neches and Galena Park, Texas.

In July 1933 petitioner prepared an Employe Representation Plan which was adopted by petitioner and the employes at its Port Neches and Galena Park refineries. Prior to this time no labor organization had asserted the right to bargain collectively for the employes at these refineries. Nearly a year later the complaining Union first asserted such a right at these refineries. Thereafter petitioner bargained collectively with representatives of both the Union and the Plan until the spring of 1937.

In March 1936 petitioner and the complaining Union had a ten-day bargaining meeting at Chicago and agreed upon Working Rules, which were signed by petitioner and expressly recognized the right of the Union to bargain for its members. These Rules were also agreed to by the employee representatives under the Plan and were put into effect at the Port Neches refinery on April 9, 1936.

In March 1937 the Union and petitioner agreed to discuss a revision of the Working Rules, but, as the Union was not able to do so until May, petitioner, with the Union's acquiescence, began a series of meetings with the Plan representatives for the purpose of first discussing such a revision with them. One of these meetings was held with the Port Neches employes on April 24-26, 1937. The Board found that certain statements made by petitioner's representatives at this meeting and certain other statements by alleged representatives of petitioner in 1937, constituted interference, restraint and coercion (Transcript of Record, pp. 481-6).

After April 1937 petitioner had no meetings with the Plan representatives at the Port Neches refinery, and after June 1937 none were had at the Galena Park refinery. The Board found that the Plan was "defunct" at both places and had "ceased to function" (Transcript of Record, pp. 470-1), but nevertheless held that petitioner had dominated the Plan and ordered petitioner to cease doing so (Transcript of Record, pp. 471, 486I).

In the spring of 1937 a new labor organization (The Employes Brotherhood) was formed by the employes at the Port Neches refinery and it is this organization as to which the Board also found domination and interference (Transcript of Record pp. 486-486F). About this time the employes at Galena Park also formed a new labor organization (The Houston Works Employes Federation) and it is this organization as to which the Board dismissed the complaint. (Transcript of Record, pp. 471-480, 486J).

Argument

1. Alleged Interference, Restraint, and Coercion

The findings upon which the Board concluded that petitioner had interfered with, restrained, and coerced its em-

ployes relate to statements made by petitioner's representatives at a meeting with certain of the employes of the Port Neches refinery on April 24-26, 1937, and to three conversations in 1937 between employes and certain persons found by the Board to be representatives of petitioner. The express findings of the Board are set forth in its decision under the caption "C. Interference, restraint, and coercion at Port Neches Works" (Transcript of Record pp. 481-486).

Petitioner submits that the said findings, on their face, do not constitute substantial evidence supporting the Board's conclusion that petitioner interfered with, restrained, and coerced its employes in violation of the Act. The statements mentioned were a proper exercise of the right of petitioner's representatives to freedom of speech.

Texas & New Orleans R. R. Co. v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, 568, 50 Sup. Ct. 427, 433;

Jefferson Electric Company v. *National Labor Relations Board* (7th Circuit), 102 F. 2d 949, 956;

Midland Steel Products Co. v. *National Labor Relations Board* (6th Circuit), 113 F. 2d 800, 804;

National Labor Relations Board v. *Asheville Hosiery Co.* (4th Circuit), 108 F. 2d 288;

National Labor Relations Board v. *Ford Motor Company* (6th Circuit), Decided October 8, 1940; 7 L. R. R. 163, 166-7-8 (not yet officially reported);

National Labor Relations Board v. *Union Pacific Stages* (9th Circuit), 99 F. 2d 153, 178.

There was no evidence, and the Board made no findings, as to how the statements found by the Board actually interfered with, restrained, or coerced any of the employes in the exercise of their rights under the Act. On the contrary, the Trial Examiner found that "the local management was on several occasions instructed by the general management and its officials that employees had a perfect right to join any organization of their choosing. Such instructions had been periodical down to the time of the hearing and trans-

mitted on down to local supervisory officials and foremen. Employes were also so instructed" (Transcript of Record pp. 165-6). He also found that petitioner "very fully established that it was very much concerned over its employees, that they should know their rights under the National Labor Relations Act * * *" (Transcript of Record p. 173). It was also undisputed that petitioner made a practice of telling each new employe that he was free to join any labor organization of his own choosing (Appendix to Petitioner's Brief p. 292).

The Board's findings as to what occurred at the meeting of April 24-26, 1937 are in many respects unsupported by the stenographic record of the said meetings (Appendix to Petitioner's Brief pp. 82-275). Reference is made particularly to paragraphs 3 and 4 of the Board's findings under the said caption (Transcript of Record pp. 481-2).

An understanding of the purposes of the meeting of April 24-26, 1937, requires some knowledge of the circumstances leading up to the meeting, which the Board ignored. These circumstances are briefly outlined in the Statement above (pp. 4-5).

2. Alleged Domination of the Brotherhood

The Board's findings respecting the organization of The Employees Brotherhood at the Port Neches refinery are set forth in the Board's decision under the caption "D. Domination of the Brotherhood" (Transcript of Record pp. 486-486F).

Briefly, the findings by which the Board connects petitioner with the formation of the Brotherhood are as follows: The Port Neches superintendent at a Plan Council meeting on April 30, 1937, announced that the management representatives were withdrawing from the Plan and indicated that the Council was at liberty to increase its membership if it so desired. Three one-time employe

representatives of the Plan Council subsequently became representatives of the Brotherhood. One of the employe organizers of the Brotherhood was the son of the construction foreman, another was "in charge" of trucks, and a third was "chief" shipping clerk. The first organization meeting was held at the home of a company engineer. One of the employe organizers, in the company of a "subforeman", visited an independent union at another oil company. Ballot boxes owned by petitioner were taken from petitioner's storehouse and used in two Brotherhood elections. These elections were conducted on petitioner's premises and, though the employment supervisor and the superintendent observed them, they did nothing to prevent them. Employes conducting the election took time cards from the rack for the purpose of assisting in soliciting votes. A foreman observed the solicitation of votes in his department and did nothing about it. Employes solicited membership in the Brotherhood on petitioner's time. When the complaining Union asked for exclusive bargaining rights in April 1938, petitioner suggested an election between the Union and the Brotherhood.

At the most, such findings indicate simply a passive attitude on the part of petitioner toward the Brotherhood. Petitioner submits that, on their face, they do not constitute substantial exidence supporting the Board's conclusion that petitioner dominated and interfered with the formation of the Brotherhood in violation of the Act.

Consolidated Edison Company v. National Labor Relations Board, 305 U. S. 197, 229; 59 Sup. Ct. 206, 217;

National Labor Relations Board v. Columbian Co., 306 U. S. 292, 299-300, 59 Sup. Ct. 501, 505;

Ballston-Stillwater Knitting Co. Inc. v. National Labor Relations Board (2nd Circuit), 98 F. 2d 758, 761-2-3;

Cupples Co. Manufacturers v. National Labor Relations Board (8th Circuit), 106 F. 2d 100, 114-116;

L. Greif & Bro., Inc. v. National Labor Relations Board (4th Circuit), 108 F. 2d 551, 557-558;

National Labor Relations Board v. Mathieson Alkali Works (4th Circuit), Decided October 7, 1940; 7 L. R. R. 169, 170-2 (not yet officially reported);

National Labor Relations Board v. Sterling Electric Motors (9th Circuit), 109 F. 2d 194, 201-210;

National Labor Relations Board v. Swank Products, Inc. (3rd Circuit), 108 F. 2d 872, 874-5.

Furthermore, the Board virtually ignores the following clearly established facts which completely nullify all the significance attributed by the Board to its findings: Bigler, Jr., the son of the general construction foreman mentioned in the Board's findings, was formerly a member of the Union, and his father had nothing to do with his activities in organizing the Brotherhood (Appendix to Petitioner's Brief pp. 308-9, 341-2, 354). Mabey, the employe found by the Board to be "in charge" of trucks, was an hourly employe and his duties were to wash and otherwise maintain the trucks (Appendix to Petitioner's Brief pp. 384, 391). He initiated the organization of the Brotherhood (Appendix to Petitioner's Brief p. 390). Kofahl, found by the Board to be the "chief" shipping clerk, was simply "a" shipping clerk and reported to the chief clerk (Appendix to Petitioner's Brief p. 366; Record of Proceedings p.1326). Hunt, the company engineer at whose apartment the first organizational meeting was held, had nothing to do with the meeting (Appendix to Petitioner's Brief p. 378). The "subforeman" who accompanied one of the Brotherhood's organizers to visit the union of another company, was not a supervisor and does not appear on Board's Exhibit 28 listing supervisory employes. Only three of the eleven ballot boxes used in the Brotherhood's elections were taken

from petitioner's storehouse, and these were taken without permission; the remaining eight boxes were constructed by the employes at home (Appendix to Petitioner's Brief pp. 369, 387-8). The elections were only partly conducted on petitioner's premises and this was in violation of instructions (Appendix to Petitioner's Brief pp. 351, 382). The elections and other organizational activities of the Brotherhood were conducted by the employes on their own time (Appendix to Petitioner's Brief p. 351). The expenses of organizing the Brotherhood were borne solely by the employes and its printing was done by an outside printer (Appendix to Petitioner's Brief pp. 338, 368). The Brotherhood was the result of a merger of two employe labor organizations, one of which was organized by Kofahl and other employes who had previously been connected with the Plan and the other of which was organized by Mabey, Bigler, Jr., and other employes who had had no connection whatsoever with the Plan (Appendix to Petitioner's Brief pp. 354, 390). Only three of the eleven Brotherhood representatives had formerly been connected with the Plan (Transcript of Record p. 486D). There was evidence that one employe had on two occasions solicited membership for the Brotherhood on petitioner's time and once on his own time (Record of Proceedings pp. 1203-6, 1223-5), but the complaining Union also solicited memberships on petitioner's time and premises on a number of occasions (Record of Proceedings pp. 1287, 1294-5, 1441-5, 1519-20). Other labor organizations were also permitted the use of petitioner's property (Record of Proceedings pp. 1302-3, 1324, 1375, 1131, 1371-2).

3. Alleged Domination of the Plan

A substantial part of the Board's findings of fact is devoted to the Employe Representation Plan (Transcript of Record pp. 465-471), which it concluded was "defunct" and had had no meetings at Port Neches for more than a

year, and at Galena Park for nearly a year, prior to the issuance of the complaint (Transcript of Record, p. 470).

For its present purposes, petitioner is not questioning that, in the light of the decisions of the courts since the discontinuance of the Plan, petitioner did technically dominate and contribute support to the Plan prior to the decision of this court establishing the constitutionality of the Act.

However, the Plan was prepared and offered to petitioner's employes more than a year before any other labor organization had asserted the right to bargain collectively at either Port Neches or Galena Park, and more than two years prior to the passage of the National Labor Relations Act. After the passage of the Act, petitioner promptly instructed its supervisors and informed its employes of their respective obligations and rights under the Act (Transcript of Record pp. 173, 203-4, 469), and, during the period (1935-1937) when the constitutionality of the Act was in the course of being determined by the courts, the Plan was continued in effect. After the constitutionality of the Act had been established, petitioner abandoned the Plan even though it had not yet been established that such Plans were illegal and a Regional Director of the Board had assured petitioner that such action was not necessary (Appendix to Petitioner's Brief pp. 400-1; Transcript of Record p. 471).

It is difficult, therefore, to see what useful purpose is served, or on what basis it is justifiable, to order petitioner to discontinue the Plan at Port Neches or Galena Park.

Reason for Allowing the Writ

1. The question of how far the National Labor Relations Board can go in exercising the powers given to it under the National Labor Relations Act without abridging the right of an employer and his representatives to freedom of speech under the First Amendment to the Consti-

tution of the United States is an important question of law which has never been determined by this Court. It is submitted that the Board's order of November 17, 1939, and the Court's decree of July 15, 1940, exceeds the limitation of the said Amendment.

2. The said order and decree conflicts with the following decisions of other circuits of the United States Circuit Court of Appeal on the question of freedom of speech and on the question of what constitutes substantial evidence of interference, restraint, or coercion of employes in violation of Section 8(1) of the National Labor Relations Act:

Jefferson Electric Company v. National Labor Relations Board (7th Circuit), 102 F. 2d 949, 956;
Midland Steel Products Co. v. National Labor Relations Board (6th Circuit), 113 F. 2d 800, 804;
National Labor Relations Board v. Asheville Hosiery Co. (4th Circuit), 108 F. 2d 288;
National Labor Relations Board v. Ford Motor Company (6th Circuit), Decided October 8, 1940, 7 L. R. R. 163, 167-8 (not yet officially reported);
National Labor Relations Board v. Union Pacific Stages (9th Circuit), 99 F. 2d 153, 178.

3. The said order and decree conflicts with the following decisions of other circuits of the United States Circuit Court of Appeal on what constitutes substantial evidence of domination and interference with the formation and administration of a labor organization and contributing support thereto in violation of Section 8(2) of the National Labor Relations Act:

Ballston-Stillwater Knitting Co. Inc. v. National Labor Relations Board (2nd Circuit), 98 F. 2d 758, 761-2-3;
Cupples Co. Manufacturers v. National Labor Relations Board (8th Circuit), 106 F. 2d 100, 114-116;

L. Greif & Bro., Inc. v. National Labor Relations Board (4th Circuit), 108 F. 2d 551, 557-558;
National Labor Relations Board v. Mathieson Alkali Works (4th Circuit), Decided October 7, 1940, 7 L. R. R. 169, 170-2 (not yet officially reported);
National Labor Relations Board v. Sterling Electric Motors (9th Circuit), 109 F. 2d 194, 201-210;
National Labor Relations Board v. Swank Products, Inc. (3rd Circuit), 108 F. 2d 872, 874-5.

Conclusion

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY T. KLEIN
OSCAR JOHN DORWIN
JAMES H. PIPKIN
LIONEL P. MARKS
Attorneys for Petitioner

135 East 42nd Street
New York, N. Y.

November 6, 1940.

Appendix

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V. Sec. 151 et seq.) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> Sec. 8. It shall be an unfair labor practice for an employer —
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> * * * * *
>
> Sec. 10. * * *
>
> (e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive * * *.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument	10
Conclusion	15

CITATIONS

Cases:

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197 — 11

Continental Box Co., Inc. v. *National Labor Relations Board*, 113 F. (2d) 93 — 12

Fullerton v. *Texas*, 196 U. S. 192 — 12

Jefferson Electric Co. v. *National Labor Relations Board*, 102 F. (2d) 949 — 13

Midland Steel Products Co. v. *National Labor Relations Board*, 113 F. (2d) 800 — 13

National Labor Relations Board v. *Asheville Hosiery Co.*, 108 F. (2d) 288 — 13

National Labor Relations Board v. *Elkland Leather Co.*, 114 F. (2d) 221, certiorari denied, No. 496, present term — 14

National Labor Relations Board v. *Ford Motor Co.*, decided October 8, 1940 — 13

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 — 11

National Labor Relations Board v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153 — 13

Strader v. *Baldwin*, 9 Haw. 260 — 11

Sully v. *American National Bank*, 178 U. S. 289 — 11

Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. V, Sec. 151, *et seq.*) — 3

277779—40——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 555

THE TEXAS COMPANY, A DELAWARE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 591–592)[1] is reported in 112 F. (2d) 744. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 454–486J) are reported in 17 N. L. R. B. 843.

[1] Pursuant to stipulation of the parties (R. 602–603), the record in this case for purposes of the petition for certiorari consists of: (1) the printed "transcript of record" filed in the court below, containing the complaint, decision of the Board, and other proceedings before the Board, and in the court below, which is referred to herein by the symbol (R.); (2) the appendix to the brief of The Texas Company, filed in the court below, containing certain portions of the evidence,

JURISDICTION

The decree of the court below (R. 592–594) was entered on July 15, 1940. A petition for rehearing filed by petitioner (R. 595–600) was denied on August 7, 1940 (R. 601). The petition for a writ of certiorari was filed on November 6, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board's findings that petitioner dominated, interfered with, and supported the Employees Brotherhood, a labor organization of its employees, in violation of Section 8 (1) and (2) of the Act.

2. Whether the Board, upon admittedly valid findings that petitioner dominated, interfered with, and supported Employees Representation Plans, labor organizations of its employees, could order petitioner to cease and desist from such domination, interference, and support, although the Plans had been abandoned by petitioner prior to the Board's order.

---

which is referred to herein by the symbol (Pet. App.); (3) the appendix to the Board's brief filed in the court below, containing certain other portions of the evidence, which is referred to herein by the symbol (Bd. App.); and (4) the appendix to the brief of Oil Workers International Union, Locals Nos. 228 and 367, intervenor in the court below, which is not referred to herein.

3. A further question urged by petitioner, but which we think is not properly presented, is whether the Board's order abridged petitioner's freedom of speech in violation of the First Amendment.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are set out at page 14 of the petition.

STATEMENT

Upon the usual proceedings [2] the Board issued its findings of fact, conclusions of law, and order (R. 454–486J). The facts, as found by the Board and as shown by the evidence, may be summarized as follows: [3]

From 1933 until this Court upheld the Act in April 1937, petitioner, as a means of combatting the Union's efforts to organize its employees, main-

[2] These, pursuant to Section 10 of the National Labor Relations Act, were: Charges and amended charges filed by the Oil Workers International Union, Locals Nos. 228 and 367, hereafter called the Union (R. 1–7, 10–14), complaint (R. 15–25), answer (R. 46–147), hearing before a trial examiner, intermediate report of the trial examiner (R. 160–178, 289–309), exceptions thereto (R. 181–287, 311–378), oral argument (R. 408–453), and the filing of briefs before the Board.

[3] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence. Jurisdictional facts are omitted, since no question as to jurisdiction is raised.

tained substantially identical Employee Representation Plans at its Galena Park and Port Neches refineries (R. 465–471; Bd. App. 173–184, 113, 21, 38, 117, 54, 119, 203, 124, 202–203, 223, 247). Upon establishment of these Plans by petitioner, all of the employees automatically became members (R. 465; Bd. App. 19, 41–43, 68–70, 178). Representatives appointed by petitioner comprised one-half of each Plan Council and petitioner could veto any action of the Councils as well as proposed amendments to the Plans (R. 466, 470; Bd. App. 176–177). The Plans provided that petitioner's Board of Directors could at any time terminate the Plans (R. 466; Bd. App. 239, 257). Both Plans were plainly company-dominated (R. 470–471).

During the first two years of the Act's operation petitioner continued to maintain the Plans at both refineries, but in April 1937 the management decided to abandon the Plans. Simultaneously, petitioner set about to replace the Plan at the Port Neches plant with another "inside" organization (R. 486F).[4] At a two-day meeting of the Port Neches employees held during the latter part of April on company time (R. 481; Bd. App. 70–71, 76; Pet. App. 312–313), Vice President Halpern and Dorwin, petitioner's attorney, made plain to

[4] The allegations of the complaint that petitioner had dominated and interfered with the formation of The Houston Works Employees Federation of The Texas Company, a labor organization at the Galena Park Refinery, were dismissed by the Board (R. 486J).

the employees the management's continued hostility toward the Union and its continued preference for a labor organization similar to the Plans (R. 481–484, 486F). Halpern and Dorwin talked of "turbulence," sit-down strikes, and other species of violence and illegality, activities which they identified with the C. I. O., the Union's parent organization (R. 482–484; Bd. App. 156–159, 163–164, 262, 268–269, 270–272, 291–292). Although the Union's policy opposed coercive solicitation of members (Bd. App. 159, 160, 270), Halpern and Dorwin guaranteed employees "their right not to join any organization they didn't want to join" and urged them to rely upon petitioner for protection against coercion by the Union (R. 482–483; Bd. App. 270–271, 284). During a purported explanation of the Act, Dorwin, seconded by Halpern, told the employees that petitioner would never enter into a contract with the Union on any subject and warned that, regardless of whether the Union represented a majority, any attempt on its part to obtain exclusive recognition or to obtain a closed shop would be rejected by the management (R. 482–483; Bd. App. 160–161, 266–268, 272–273). Praising individual bargaining, as distinguished from collective bargaining (Bd. App. 157, 165, 263–264, 270), Halpern contrasted the Union's practice of dealing through representatives and committees with the happy situation illustrated by the meeting, where all the employees were "sitting together with management" and could "tell any-

thing they feel is wrong * * *" (Bd. App. 273–274), and insisted that "if anybody will tell me that is better bargaining than sitting here with 550 men and letting them say what they want, I'll give up * * *" (R. 483–484; Bd. App. 281, 290). After referring in derogatory terms to the representation of the employees in past conferences between petitioner and the Union, Halpern concluded his description of such a conference with the statement that it showed "how truly you were represented" and "how much bargaining you got * * * Hell, wasn't a Port Neches man there. So you fellows got some swell representation as far as I can see" (R. 483; Bd. App. 161–162, 281–282). Having disposed of the Union as a bargaining medium, petitioner's officials proceeded to impress upon the employees the form which petitioner desired their representation to take. Dorwin praised an independent organization existing at one of petitioner's plants (Bd. App. 264). Halpern held forth upon the superiority over the Union, with its tendency to resort to strikes and its representative methods, of intra-company adjustment of grievances and discussion of working conditions under the machinery of the Plan (R. 483, 484; Bd. App. 160–162, 165, 166, 271–272, 273–274), reiterating that "you have always got the right to bargain as an individual. I personally think it is a good idea for people to affiliate themselves to the extent that they have got the same

method of bargaining collectively. I just leave that thought with you" (Bd. App. 157, 270). Finally, Dorwin told the employees that, despite the validation of the Act, the Plan, with some minor adjustments, was legal and would be continued (R. 482; Bd. App. 264–265).

A few days after this meeting Vice President Halpern caused the management representatives on the Plan Council to be withdrawn (R. 486; Bd. App. 35–36, 59–60, 114–115, 123–124). Superintendent Dengler then informed the employee representatives on the Council that this withdrawal did not reflect upon the legality of the Plan, and suggested continuance of the rump of the Plan Council with some minor changes, which he proceeded to outline (R. 486, 486F; Bd. App. 258–260, 123). The Plan was not dissolved and so far as appears petitioner took no steps to explain its status to the employees (R. 470). The employee representatives on the Plan Council, under the leadership of Chief Shipping Clerk Kofahl,[5] continued to function, substantially in accordance with Superintendent Dengler's recommendations, under the name "Employees Brotherhood" (R. 486–486A; Bd. App. 35–36, 58, 59, 136,

[5] Kofahl, an employee of 31 years' service with petitioner, had three or four employees subject to his direction, earned a salary comparable to that of persons occupying admittedly supervisory status, and since 1934 had been prominent in the Plan (R. 486–486A; Bd. App. 87–88, 94, 61–62, 91, 240–241, 245, 250).

277779—40——2

146, 147). About a month thereafter, i. e., around the end of May, the Employees Brotherhood merged with another "inside" union known as the "Employees Independent Federation" to form the Brotherhood as it was constituted at the time of the hearing (R. 486A–486B; Bd. App. 135, 146–147). The Board found that the Federation, which was initiated by a group including Kofahl and Bigler, Jr., the son of the general construction foreman who was chairman of the Plan Council (R. 486A; Bd. App. 78, 129, 258, 101, 145), was formed as the direct result of the decisions of this Court upholding the Act (R. 486E). After the first Federation meeting Kofahl returned to the Plan Council as a basis for future organization, leaving Bigler, Jr., in control of the Federation (R. 486A; Bd. App. 145–146).

The Brotherhood was officered and controlled by persons prominent in the Plan and identified with the management (R. 486B, 486D; Bd. App. 85, 89, 132, 147). Aside from the elimination of management representatives from the Council, the Brotherhood's constitution was virtually a restatement of the Plan (R. 486B; Bd. App. 296–301). As under the Plan, employment by petitioner automatically entailed membership in the Brotherhood; there was no provision for membership meetings and no regular dues were required (R. 486B; Bd. App. 178, 296–298, 84–85, 90, 91, 93, 94, 148, 98–99, 301). The Brotherhood elections, which adhered closely to the procedure followed under the Plan (Bd. App. 20, 69–70, 71–73, 91–93, 242–244), were

conducted, with full knowledge of petitioner's officials (R. 486C; 384, 385, 396; Bd. App. 125–126), on company time and property (R. 485, 486C, 486D; Bd. App. 71–77, 95–96, 97–99, 100–101, 104–105, 109, 111–113, 125–126, 149–150, 152–153) and with the use of facilities formerly accorded the Plan by petitioner (R. 486C; Bd. App. 140, 144–145). Petitioner's tacit support was supplemented by explicit manifestations of approval of the Brotherhood and of hostility toward the Union (R. 484–485; Bd. App. 101, 110–111; *cf.* 28–30, 33, 39–40, 57–61, 63, 323–324).

After the elections, the Brotherhood became almost completely inactive (R. 486D–486E; Bd. App. 84, 89, 90, 97, 107, 115, 133, 153) until petitioner resurrected it to defeat the Union's request, in April 1938, for recognition as the exclusive bargaining representative of the Port Neches employees; at that time petitioner refused to recognize the Union without an election in which the Brotherhood would appear on the ballot (R. 485E; Bd. App. 166–167, 341–342). So far as appears, this condition was interposed by petitioner without consulting the Brotherhood or inquiring whether it wished to participate in the election.

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. 486F–486H). Its order required petitioner to cease and desist from its unfair labor practices, including its domination of and interference with the Plans at both

the Port Neches and Galena Park refineries, to withdraw recognition from and disestablish the Employees Brotherhood at Port Neches, and to post appropriate notices (R. 486I–486J).

On November 25, 1939, the Company filed in the Court below a petition to review and set aside the Board's order (R. 509–524). On June 19, 1940, the Court handed down its opinion (R. 591–592) and on July 15, 1940, entered its decree enforcing the Board's order in full (R. 593–594). On August 7, 1940, a petition for rehearing filed by petitioner (R. 595–600) was denied (R. 601).

ARGUMENT

1. Petitioner's contention (Pet. 5–10) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra,* pp. 3–9) affords full support for the challenged findings. Petitioner further contends (Pet. 12–13) that in holding that the Board's findings have the requisite evidentiary support the decision below is in conflict with various enumerated decisions of other Circuit Courts of Appeals; however, each of the cases cited turned, like the present case, upon its own particular facts.

2. Petitioner contends (Pet. 4, 11) that, despite the admitted (Pet. 11) validity of the findings that petitioner interfered with, dominated, and supported the Employee Representation Plans, the

cease and desist order (R. 565) was improper because petitioner voluntarily abandoned the Plans prior to the order. This raises no question not controlled by the express terms of the Act (Section 10 (c)) and heretofore settled by decisions of this Court. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 230; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 271.

3. Petitioner also asserts (Pet. 4, 6, 12) that because certain of the subsidiary findings upon which the Board rested its conclusion that petitioner interfered with, dominated, and supported the Employees Brotherhood and coerced the employees in the exercise of their right of self-organization, concerned speeches made by company officials to the employees (see pp. 5–7, *supra;* R. 481–484, 486F), the Board's order abridges petitioner's freedom of speech in violation of the First Amendment. However, no defense based upon the First Amendment was raised before the Board, or before the court below prior to judgment, and the court made no mention of the point in its opinion (R. 591–592).[6] The petition for rehearing advanced the contention

[6] The fact that the Board suggested in its brief filed in the court below (Brief for the National Labor Relations Board, No. 9349, April Term, 1940, Circuit Court of Appeals for the Fifth Circuit, note 28, pp. 28–29) that the speeches could not be defended upon the basis of the First Amendment, is immaterial; it was incumbent upon petitioner to raise the point. *Strader* v. *Baldwin,* 9 How. 260, 262; *Sully* v. *American National Bank,* 178 U. S. 289, 297.

for the first time (R. 597) but the order (R. 601) denying that petition without opinion did not necessarily pass upon the point: the court may have concluded that since the contention was not advanced before the Board it could not be raised before the court (Section 10 (e), (f)), or that it was raised tardily, or that since the Board's findings of unfair labor practices were supported by the other substantial evidence reviewed in the Statement (pp. 3–9, *supra*), no portion of the Board's order turned upon the validity of the particular subsidiary findings reached by the contention. *Cf. Fullerton* v. *Texas,* 196 U. S. 192.

Furthermore, in the present case the court held that the Board's findings of fact were supported by substantial evidence (R. 591–592); presumably this holding included the finding (R. 484) that the speeches in question interfered with, restrained, and coerced the employees. Therefore, even if the court below passed upon petitioner's free-speech contention, its holding was merely that oral communications properly found by the Board to be coercive in fact are not protected by the First Amendment.[7] Such a holding would not be in clear

[7] Subsequent to its decision in the present case the court below enforced an order of the Board over objection that some of the findings upon which it was based concerned statements allegedly protected by the First Amendment. *Continental Box Co., Inc.*, v. *National Labor Relations Board*, 113 F. (2d) 93. The court said (at p. 97):

"* * * The constitutional right of free speech in regard to labor matters is just as clearly a right of employers

conflict with the cases cited by petitioner.[8] In the *Midland Steel* case, the Circuit Court of Appeals for the Sixth Circuit held that certain letters and statements addressed by the employer to the employees, upon which a portion of the Board's order was based, were not coercive in fact and that a prohibition of noncoercive communications by an employer was contrary to the First Amendment. The court confined itself to an inquiry into the question whether the communications were intended to or actually did exert "pressure" amounting to "compulsion" or "interfere with or restrain attempts to organize," and based its decision upon the factual conclusion that they constituted an effort by the employer to "secure cooperation" with the employees and were "wholly lacking in any element of threatened discrimination because of union

---

as of employees, and if the act purported to take away this right, it could not stand * * *. But the enforced statute has not undertaken at all to interfere with or limit the right of free speech. All that the statute prohibits is domination, interference and support. The employer has the right to have and to express a preference for one union over another so long as that expression is the mere expression of opinion in the exercise of free speech and is not the use of economic power to coerce, compel or buy the support of the employees for or against a particular labor organization."

[8] *National Labor Relations Board* v. *Ford Motor Co.*, decided October 8, 1940 (C. C. A. 6th); *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. (2d) 800 (C. C. A. 6th); *Jefferson Electric Co.* v. *National Labor Relations Board*, 102 F. (2d) 949 (C. C. A. 7th); *National Labor Relations Board* v. *Asheville Hosiery Co.*, 108 F. (2d) 288 (C. C. A. 4th); *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C. C. A. 9th).

membership or activity" (113 F. (2d), at 804). It is not clear whether the refusal of the same court in the *Ford* case to enforce an order of the Board requiring the company to cease and desist from distributing to its employees pamphlets disparaging labor organizations, was based upon the court's determination that the pamphlets previously distributed were not coercive, or upon the ground that the Act could not constitutionally be applied to prevent even coercive expressions by employers of their views on labor matters. If the latter, the *Ford* decision might be said to be in conflict with the decision in the present case, assuming that the First Amendment contention was passed upon by the court below. This Court has recently indicated, however, that it does not regard the *Ford* case as supplying a conflict warranting review of such cases as the present. *Elkland Leather Co., Inc.* v. *National Labor Relations Board,* No. 496, this Term, certiorari denied November 18, 1940 (petition not opposed by the Board).

The *Jefferson Electric, Asheville,* and *Union Pacific Stages* cases do not hold that statements of an employer validly found to be coercive or intimidating in fact are nevertheless protected by the First Amendment; on the contrary, in each of these cases the court expressly or by implication recognized that communications actually coercing the employees in their freedom of self-organization afford a proper basis for a finding of violation of the Act. The inquiry in each case was directed to

the question whether the Board's findings that the statements were coercive were supported by the evidence. In the *Jefferson Electric* case the court was of the opinion that the Board's findings were not adequately supported. In the *Asheville Hosiery* case the Board's order was enforced as to employer utterances which the court agreed were calculated to coerce the employees. In the *Union Pacific Stages* case the court disapproved the Board's finding of coercion as to some of the utterances involved, and approved the finding as to others; the Board's order based upon the latter utterances was enforced.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
CHARLES FAHY,
Assistant Solicitor General.
THOMAS E. HARRIS,
Special Assistant to the Attorney General.
ROBERT B. WATTS,
General Counsel,
LAURENCE A. KNAPP,
Assistant General Counsel.
MORTIMER B. WOLF,
HILDA D. SHEA,
Attorneys.
National Labor Relations Board.

DECEMBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940